

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2017-305-E

IN RE:

Request of South Carolina Office of)	<u>SCE&G'S BRIEF IN SUPPORT OF ITS</u>
Regulatory Staff for Rate Relief to)	<u>MOTION TO DISMISS</u>
SCE&G Rates Pursuant to)	
S.C. Code Ann. § 58-27-920)	TABLE OF CONTENTS
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South Carolina Electric & Gas Company ("SCE&G" or the "Company"), by and through the undersigned counsel and pursuant to 10 S.C. Code Ann. Regs. 103-829 and Order No. 2017-58-H, hereby submits this Brief in Support of its Motion to Dismiss the Request for Rate Relief (the "Request") filed by the South Carolina Office of Regulatory Staff ("ORS"). As set forth herein, ORS's Request seeks relief which is illegal and unconstitutional and outside the statutory powers of the Public Service Commission of South Carolina ("Commission"). Moreover, any action by the Commission to grant – even provisionally – the relief contained in ORS's Request will injure SCE&G financially and damage its ability to access the capital needed to maintain its system and provide service to its customers on reasonable terms.

INTRODUCTION

This case involves ORS's challenge to revised rates that this Commission authorized SCE&G to charge in *nine* final orders, from which no appeals were taken. This Commission – in most cases with ORS's prior concurrence – approved these revised rates after determining that they were statutorily authorized and necessary to cover SCE&G's prudent investment of

approximately \$3.8 billion¹ for the construction of two new nuclear power generation units (the “Units”) at the V.C. Summer Nuclear Site. The revised rates at issue in this case provide SCE&G with approximately \$445 million in annual revenue, which supply the debt service and earnings required to support \$3.8 billion of investment in this previously-approved construction project. As discussed below, suspending SCE&G’s collection of that revenue could result in massive write-downs and defaults on credit agreements. Doing so would also deeply injure investors. Additionally, it would jeopardize the continued financial viability of the Company and its ability to operate and maintain a safe, efficient and reliable utility system to serve its customers. For those reasons, suspending collection of revised rates would be illegal, and would not result in rates that are fair, just or reasonable as the law requires.

The Suspension Request

In the Request, ORS seeks two forms of relief. First, it asks the Commission to issue an order requiring that “SCE&G suspend all revised rates collections from customers” (the “Suspension”). (Request, ¶ 19.) It requests that this Suspension be enacted *before* any evidentiary hearing is held on the merits of the Request, and even though ORS’s Request is devoid of *any* of the statutorily-required information that can be used to justify such relief or to show that the Suspension would result in rates that are “fair and reasonable,” as required by § 58-27-920, or “just and reasonable,” as required by § 58-27-810. As such, ORS’s request for Suspension should be dismissed for failure to comply – even at the most superficial level – with the requirements imposed on such requests by §§ 58-27-810 and 58-27-920 of the South Carolina Code.

¹ An additional \$1.3 billion in investment made since the last revised rates order was issued in 2016 remains to be considered. The \$3.8 billion figure also includes approximately \$310 million in investments in transmission upgrades that will be placed in service despite the abandonment of the project.

The Future Amendment Request

In addition to seeking suspension of previously approved rates, ORS asks the Commission to amend the requested Suspension order – which has not been entered – “if the General Assembly takes action to amend or repeal the Base Load Review Act (the “BLRA”) or a court of competent jurisdiction declares the BLRA unconstitutional” (Request, ¶ 20.) In other words, ORS asks the Commission to amend a hypothetical order based on legislative and/or judicial actions that have not been taken, or even initiated. It is self-evident that this request is not appropriate for adjudication. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430–31, 468 S.E.2d 861, 864 (1996). Accordingly, the second request should be dismissed without further discussion.

STANDARD OF REVIEW

“In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The Commission must “construe the complaint in a light most favorable to the nonmovant and determine if the ‘facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.’” *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (quoting *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001)). A motion to dismiss “must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case.” *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (Ct. App. 1997); *see also Jarrell v. Petoseed Co.*, 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998). Moreover, if a plaintiff/petitioner fails to comply with statutory requirements that mandate certain pre-filing procedures, its complaint must be dismissed for failure to state a claim. *See*

Duckett v. SCP 2006-C23-202, LLC, 225 F. Supp. 3d 432, 437 (D.S.C. 2015) (finding that if a claim fails to satisfy statutory requirements regarding pre-filing procedures for medical malpractice claims, “it must be dismissed for failure to state a claim”); *see also Moore-Rowe v. Bon Secours-St. Francis Xavier Hosp., Inc.*, No. 2015-UP-289, 2015 WL 3823834, at *1 (Ct. App. June 17, 2015) (unpublished) (holding the same).

LEGAL ANALYSIS

I. ORS FAILED TO PUT FORTH ANY EVIDENCE ESTABLISHING THAT ITS PROPOSED RATES ARE FAIR AND REASONABLE.

The Suspension is requested pursuant to § 58-27-920, which states: “The commission may, after a preliminary investigation by the Office of Regulatory Staff and upon such evidence as to the commission seems sufficient, order any electrical utility to put into effect a schedule of rates as shall be deemed fair and reasonable.” S.C. Code Ann. § 58-27-920. Section 58-27-920 is not the ratemaking statute generally used to set base rates for electric utilities, which is § 58-27-860. ORS has offered no explanation as to why proceeding under this clear and well-understood, statute would be inappropriate in this case. Instead, ORS seeks to proceed under a little used and antiquated statute, § 58-27-920, which allows new rates to be imposed upon request by ORS after preliminary investigation and without a prior hearing. Section 58-27-920 and its companion statutes were enacted in 1934 and 1937 and do not appear to have been updated in many decades.²

² Section 58-27-920 was adopted in the early years of the establishment by the State of South Carolina of a Public Service Commission and a comprehensive regulatory system to oversee electric utilities. SCE&G is informed and believes that § 58-27-920 was never intended as a means to adjust rates which have been established through a comprehensive rate review process such as is provided by §§ 58-27-860 and 58-27-870 and where those statutes can be used effectively to regulate the utility in question. Instead, SCE&G believes that § 58-27-920 was intended to be used in those instances that arose more often in the early days of regulation in which utilities were charging rates which had yet to receive any regulatory review, or where those utilities refused to cooperate in the rate making process. Section 58-27-920 does not contain the notice and opportunity for hearing provisions that would be expected or required in a rate statute of general applicability or those which would generally apply to matters such as this. SCE&G asks the Commission to determine that § 58-27-920 does not in fact apply here and if it were to apply, would not protect SCE&G’s constitutional Due Process and Administrative Due Process rights to notice and an

Section 58-27-920 requires the Commission to set rates in an *ex parte* fashion (*i.e.*, without a hearing) based solely on the results of a “preliminary investigation” conducted by ORS. This preliminary investigation must provide “such evidence as to the commission deems sufficient” to determine that the rates proposed by ORS “shall be deemed fair and reasonable” if imposed. S.C. Code Ann. § 58-27-920.

A. ORS Has Failed to Conduct a Preliminary Investigation Demonstrating the Fair and Reasonable Nature of the Rates Proposed.

Under § 58-27-920, a hearing on proposed rates can only take place if the Commission orders the utility to impose the rates proposed by ORS and the utility then files a request for a hearing concerning those rates. *See* S.C. Code Ann. § 58-27-930. Accordingly, before initiating proceedings under this statute, the Commission must determine that the requested rates are “fair and reasonable” based on its review of ORS’s “preliminary investigation.” If ORS has failed to conduct a preliminary investigation or to show that the resulting rates would be fair and reasonable, then the Commission’s only recourse is to dismiss the request. There is no other basis on which the proceeding can go forward.

In this case, ORS has not presented any evidence that a “preliminary investigation” has been conducted or that the proposed rates would be “fair and reasonable” if adopted by the Commission. To perform such an investigation, ORS would need to review SCE&G’s current revenues, costs and financial results in light of the proposed rates. It would need to determine that SCE&G’s creditworthiness and viability as a business could be sustained if approximately \$445 million in annual revenue was disallowed. ORS has provided nothing to indicate such an investigation has taken place, or that it shows that the proposed rates are fair and reasonable.

opportunity to be heard under the principles announced in *Kurschner v. City of Camden Planning Comm’n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008) and *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997).

Therefore, ORS has not met the statutory pre-requisite to proceeding under § 58-27-920, and its request for Suspension should be dismissed.

B. The Facts Establish that the “Fair, Just and Reasonable” Standard Cannot Be Met with Regard to the Rate Suspension Request.

The Request seeks disallowance of earnings on approximately \$3.8 billion of SCE&G’s investment in the nuclear project that is currently reflected in revised rates. An additional \$1.3 billion is not yet reflected there. (Addison Aff., ¶ 25.) Net of the transmission investment, which will not be abandoned, the total investment is \$4.8 billion. This \$4.8 billion represents funds that investors have provided to SCE&G in the form of bonds, common stock, and retained earnings to support the project. (*Id.*)

If the Commission were to disallow SCE&G’s right to earn a return on that \$4.8 billion in investment, as ORS requests, SCE&G would be required to take a write-down of approximately \$2.9 billion against its common equity.³ (*Id.*, ¶ 28.) This write-down would reduce SCE&G’s equity component to approximately 32%, and would reduce SCANA’s equity component to approximately 27%. (*Id.*, ¶ 29.) These are unsustainable numbers.

If SCANA’s and SCE&G’s equity components drop to these levels, their short-term credit facilities will go into default because of certain covenants in those facilities. (*Id.*, ¶ 30.) This could be catastrophic because SCANA and SCE&G use their short-term credit facilities to support the cash needs of their daily operations, make payroll, and pay the costs of their many on-going system improvement projects. (*Id.*, ¶ 8.) In addition, upon default, the outstanding debt under these credit facilities would become due immediately. (*Id.*, ¶ 30.) SCE&G and

³ The difference of approximately \$2.0 billion between these numbers reflects the aggregate income tax deduction that would result from the write-down and related research deductions. (Addison Aff., ¶ 20.)

SCANA would need to find replacement funding on an emergency basis, which likely would be very expensive, if it was available at all. (*Id.*)

Moreover, SCE&G's credit rating is currently one notch above investment grade at Moody's and Standard & Poor, and at investment grade at Fitch. (*Id.*, ¶ 15.) If the Commission were to order Suspension, ratings agencies would almost certainly downgrade SCANA's and SCE&G's debt ratings, possibly pushing them both below investment-grade. (*Id.*, ¶ 16.) This would result in a dramatic rise in the companies' debt costs. (*Id.*, ¶ 30) In such an event, SCE&G and SCANA would be required to post several hundred millions of dollars in cash collateral for major contracts – including fuel supply contracts under which they purchase coal and natural gas for electric generation purposes, and natural gas for distribution to natural gas customers – and costs would rise. (*Id.*)

To restore SCE&G's equity ratio to its prior levels, SCANA would be required to issue approximately \$3 billion in additional common stock. SCE&G, however, would have directly lost approximately \$445 million in annual revenues that currently supports earnings on its stock, and thus the valuation of that stock in the market. (*Id.*, ¶ 32.) At current share prices, SCANA would need to issue approximately 65 million additional shares of common stock to recapitalize its balance sheet. (*Id.*) It is not clear at what price SCANA could issue additional common stock under these circumstances.

C. ORS Has Not Shown That the Proposed Rates Would Protect the Financial Integrity of SCE&G, As Required to Meet the “Fair and Reasonable” Standard of § 58-27-920 and the “Just and Reasonable Standard” of the Taking Clause.

In South Carolina, “[e]very rate made, demanded or received by any electrical utility . . . shall be just and reasonable.” S.C. Code Ann. § 58-27-810. This standard admits no exception. It applies equally to rates set under § 58-27-860 as to rates set under § 58-27-920.

The legislature's invocation of the "just and reasonable" language in this context is not accidental. Rather, it is used to comport with the requirements of the Takings Clause of the Fifth Amendment to the United States Constitution and the analogous takings clause found in Article I, § 13(A) of the South Carolina Constitution. The Takings Clause mandates that "[n]o person shall be . . . deprived of . . . property, without due process of law, ***nor shall private property be taken for public use, without just compensation.***" U.S. Const. amend. V (emphasis added). "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989); accord, *Covington & L. Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 593 (1896).

To meet the Takings Clause standard, rates must be shown to protect investors' "legitimate concern with the financial integrity of the company whose rates are being regulated." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944). As the U.S. Supreme Court has stated:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Id. (citations omitted). This principle is often supplemented with language from an earlier case, *Bluefield*, which held:

The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va., 262 U.S. 679, 692–93 (1923) (citations omitted).

Together, the *Hope* and *Bluefield* cases provide “the basic principles of utility rate regulation” in South Carolina. *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 595, 244 S.E.2d 278, 281 (1978), *holding modified by Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 313 S.E.2d 290 (1984); *Patton v. S.C. Pub. Serv. Comm'n*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984). Indeed, multiple orders issued by this Commission reference *Hope* and *Bluefield* as controlling precedents in South Carolina.⁴ The court applied these principles in *Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff*, holding that it was reversible error for the Commission not to have accepted as an adjustment to test period data a belatedly discovered bill of \$65,856 for property taxes, because failing to set rates sufficient to recover that amount could jeopardize the financial viability of the utility. 420 S.C. 305, 803 S.E.2d 280, 286–287 (2017).

To meet the Constitutional mandates of *Hope* and *Bluefield*, ORS must provide a basis on which the Commission may reasonably conclude that SCE&G’s rates after Suspension would generate revenues sufficient, “not only for [SCE&G’s] operating expenses but also for the capital costs of the business,” including funds to provide for “service on the debt and dividends on the stock,” and a “return, moreover . . . sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.” *Hope Natural Gas Co.*, 320 U.S. at 603. ORS clearly has not undertaken to do so and as Mr. Addison’s affidavit shows, the rates it proposed do not and cannot meet these standards.

⁴ See, e.g., Order No. 2016-871, Docket No. 2016-227-E; Order No. 2012-951, Docket No. 2012-951 (Dec. 20, 2012); Order No. 2010-471, Docket No. 2009-489-E (July 15, 2010); Order No. 2005-2, Docket No. 2004-178-E (Jan. 6, 2005).

D. It Would Be Arbitrary and Capricious for the Commission to Set Rates for SCE&G Without a Factual Basis for Determining Them to Be Fair, Just, and Reasonable.

The Commission is required to conduct rate-setting proceedings in accordance with the provisions of the Administrative Procedures Act. *See, e.g., Hamm v. Pub. Serv. Comm'n of S.C.*, 310 S.C. 13, 16, 425 S.E.2d 28, 30 (1992). As such, its orders cannot be sustained if they “are without evidentiary support or are arbitrary or capricious as a matter of law.” *Id.* The South Carolina Supreme Court has defined arbitrary to mean:

[B]ased alone upon one’s will, and not upon any course of reasoning and exercise of judgment; bound by no law; done capriciously or at pleasure, without adequate determining principle, nonrational; not governed by any fixed rules of standard.

Hatcher v. S.C. Dist. Council of Assemblies of God, Inc., 267 S.C. 107, 117, 226 S.E.2d 253, 258 (1976) (internal citation and quotation marks omitted). In the context of rate-making proceedings, this means that “[t]he determination of a fair rate of return must be documented fully in [the Commission’s] findings of fact and based exclusively on reliable, probative, and substantial evidence on the whole record.” *Porter v. S.C. Pub. Serv. Comm’n*, 332 S.C. 93, 98, 504 S.E.2d 320, 323 (1998). Here, there is no conceivable factual basis upon which the Commission could conclude that granting the Suspension would result in rates which allow SCE&G the opportunity to earn a fair rate of return or protect the reasonable expectations of its investors. Such an order would, therefore, be arbitrary and capricious and without evidentiary support. *Hatcher*, 267 S.C. at 117, 226 S.E.2d at 258.

Moreover, the fact that SCE&G could request a hearing and suspend the rate *after it is imposed by the Commission* would not cure the statutory defect. The fact that an arbitrary order may later be corrected in no way changes the illegal and unconstitutional nature of that order when entered. Furthermore, in this case, as Mr. Addison has indicated, a decision by the

Commission to order the Suspension would be itself be highly injurious to the Company and would damage the Company's creditworthiness, capital costs and equity values –perhaps fatally– during the period between the order and any hearing. *See infra* Part I.C.

Furthermore, to accept the ORS filing, and order the suspension of revised rates collection, the Commission would have to determine not to implement the statutorily mandated ratemaking policies of this state as contained in the BLRA. Those policies have been in force since before the project began. In reliance on them, SCE&G has raised approximately \$4.9 billion in capital for this project. To rule as ORS requests at this juncture would be arbitrary and unreasonable.

In fact, inconsistency in regulation can constitute a Takings Clause violation in itself:

The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions.

Duquesne Light Co., 488 U.S. at 315; *see also Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 527 (2002).

II. THE ATTORNEY GENERAL'S OPINION CANNOT PROVIDE A BASIS FOR IMPOSING THE RATES REQUESTED BY ORS.

The principal basis on which ORS has sought to justify Suspension is an opinion from the Attorney General of South Carolina, dated September 26, 2017, asserting that portions of the BLRA “as applied” are “constitutionally suspect.”⁵ Based on that opinion (the “Attorney General’s Opinion” or the “Opinion”), and based on no investigation by ORS of any sort, ORS asks the Commission to reduce SCE&G’s current rates by \$445 million. There are multiple

⁵ S.C. Att’y Gen. Advisory Opinion Regarding the Constitutionality of the Base Load Review Act of 2007 (Sept. 26, 2017), *available at* <http://www.scag.gov/archives/33239> [hereinafter *Att’y Gen. Advisory Opinion Re BLRA*].

reasons why the Attorney General's Opinion cannot provide a sufficient basis for the Commission to adopt the rates requested by the ORS.

A. For Purposes of these Proceedings, the Commission Must Assume that the BLRA is Constitutional.

ORS asks the Commission to suspend \$445 million in revised rates revenue based on its *prediction* that “the General Assembly is likely to take action to amend or revoke the BLRA or a court will be asked to issue an order ruling on the BLRA’s constitutionality.” (Request, ¶ 15.) But no such action has been taken. In other words, ORS asks the Commission to enter an administrative ruling that the BLRA is unconstitutional before any court has so ruled. This is something that the Commission simply does not have the authority to do.

A statute duly enacted by the General Assembly is “presumed constitutional.” *Horry Cty. Sch. Dist. v. Horry Cty.*, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001). Moreover, it “must continue to be enforced unless set aside by a court or repealed by the General Assembly.” *Op. S.C. Att’y Gen.*, 2016 WL 6496888 (Oct. 25, 2016) (quoting *Op. S.C. Att’y Gen.*, 2003 WL 290143494 (Apr. 1, 2003)). To date, no court has determined that the BLRA is unenforceable or unconstitutional, and it has not been repealed by the General Assembly.

Though the Attorney General has issued an *opinion* suggesting that portions of the BLRA may be “constitutionally suspect,” that same opinion expressly states that it “is not a judicial ruling of a court,” and that any constitutional concerns raised therein “would need to be addressed by a court or by the General Assembly in its review of the BLRA.” (Att’y Gen. Advisory Op. at 14.) The Attorney General could not have been clearer that the BLRA is enforceable until a court determines otherwise:

[W]e must presume the BLRA to be constitutionally valid. Only a court may declare any portion of the [BLRA] unconstitutional. This Office, in its Opinion,

may only comment upon potential constitutional issues which we see as possibly arising in a judicial proceeding.

Id. at 46 (emphasis added).

The Commission – like the Attorney General – must presume that the BLRA is constitutionally valid unless and until a court finds otherwise. *See Duncan v. York Cty.*, 267 S.C. 327, 343, 228 S.E.2d 92, 99 (1976) (recognizing the “strong presumption of constitutionality of all legislative acts”). As courts have long-held, administrative agencies, like the Commission, do not have the power to adjudicate the constitutionality of laws and statutes. *See Beaufort Cty. Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 241, 516 S.E.2d 655, 660–61 (1999) (“An administrative agency must follow the law as written until its constitutionality is judicially determined; an agency has no authority to pass on the constitutionality of a statute.”); *see also Greene v. McElroy*, 360 U.S. 474, 507 (1959) (stating that agency administrators are “not endowed with the authority to decide” constitutional questions); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944) (“Certainly no power to adjudicate constitutional issues is conferred on the Administrator.”); *Port Royal Min. Co. v. Hagood*, 30 S.C. 519, 9 S.E. 686, 688 (1889) (“It is not the province of the board of agriculture to determine the constitutionality of laws defining their own powers.”). The South Carolina Supreme Court has held that administrative agencies cannot rule on the constitutionality of statutes because giving them such power would violate the separation of powers. *See, e.g., Ward v. State*, 343 S.C. 14, 19-20, 538 S.E.2d 245, 247-48 (2000) (“Allowing ALJs to rule on the constitutionality of a statute would violate the separation of powers doctrine.”).

ORS cannot avoid this prohibition by asserting that the Attorney General’s Opinion is not a facial challenge to the BLRA but a challenge to the BLRA as applied. *Cf. Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 38–39 (2011). The South Carolina

Supreme Court has described a facial challenge as “an attack on a statute itself as opposed to a particular application.” *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). A facial challenge to the BLRA is precisely what ORS purports to bring in its Request. The Attorney General’s Opinion is not based on any facts or factual record. ORS cites it for the generic propositions that the BLRA is invalid because it: (1) ““fails to strike the constitutionally required balance between investors and ratepayers;”” (2) ““denies ratepayers procedural due process;”” and (3) ““rewards abandonment of nuclear projects.”” (Request, ¶ 14 (quoting Att’y Gen. Advisory Op. Re BLRA).) These allegations address the BLRA itself, not its specific application arising out of the unique circumstances of this case.

Furthermore, ORS has participated in all six prior contested-case BLRA proceedings associated with the Units, including Docket No. 2016-223-E, the proceeding in which the current cost schedules were approved. In those proceedings, ORS had the right to present evidence, cross-examine witnesses, present its claims and concerns to the Commission, and appeal any orders it believed to be unlawful.⁶ ORS participated in broadly-based settlement agreements in three of these proceedings.⁷ In two of these cases, the resulting orders have been appealed to the South Carolina Supreme Court and upheld there. *S.C. Energy Users Comm. v. S.C. Elec. & Gas*, 410 S.C. 348, 359, 764 S.E.2d 913, 918–19 (2014); *Friends of Earth v. Pub. Serv. Comm’n of S.C.*, 387 S.C. 360, 364, 369, 692 S.E.2d 910, 912, 915 (2010). The eight revised rate adjustments made after Order No. 2009-104(A), have been authorized by eight final and unappealed orders issued under § 58-33-280.⁸ The time to challenge the constitutionality of the

⁶ See Docket No. 2008-196-E, Order No. 2009-104(A); Docket No. 2009-293-E, Order No. 2010-12; Docket No. 2010-376-E, Order No. 2011-345; Docket No. 2012-203-E, Order No. 2012-884; Docket No. 2015-103-E, Order No. 2015-661; Docket No. 2016-223-E, Order No. 2016-794

⁷ See Docket Nos. 2010-376-E, 2015-103-E, 2016-223-E.

⁸ Order No. 2009-696, Docket No. 2009-211-E; Order No. 2010-625, Docket No. 2010-157-E; Order No. 2011-738, Docket No. 2011-207-E; Order No. 2012-761, Docket No. 2012-186-E; Order No. 2013-680(A), Docket No. 2013-

BLRA *as applied* would have been in these fourteen Commission proceedings in which it was, in fact, applied. No party did so. The time for raising claims concerning whether those revised rates orders were based on a constitutionally ‘suspect’ statute as applied has long passed.

Moreover, even if the BLRA were determined by the courts to be “constitutionally suspect” as the Attorney General suggests, there is nothing to say that the courts would apply their ruling retrospectively to violate the rights of the investors who have committed approximately \$4.9 billion to the project in reliance on them:

When a statute is found unconstitutional, we have recognized the general rule that an adjudication of [the] unconstitutionality of a statute ordinarily reaches back to the date of the act itself.... However, we also have recognized the necessity of upholding the validity of transactions or events that occurred before a statute was declared unconstitutional.... A close reading of the few South Carolina cases discussing the general rule indicates it is followed except in special or unusual circumstances, such as when doing so would create widespread havoc involving a great number of people or transactions, spawn unnecessary litigation, or result in flagrant injustice.

Bergstrom v. Palmetto Health All., 358 S.C. 388, 400, 596 S.E.2d 42, 48 (2004); *see also White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 374, 601 S.E.2d 342, 346 (2004) (applying the exception). Retroactively applying the ruling that ORS seeks from this Commission would destroy the value of millions of shares of stock issued and purchased in reliance on the BLRA, and would compromise the value of billions of dollars of bonds issued and purchased on that same basis. It would put at serious risk the continued financial viability of a utility company on which a great part of the state – and over 700,000 individual customers – rely day-to-day for electric service, and which employs thousands of South Carolina citizens. There is no basis on

150-E; Order No. 2014-785, Docket No. 2014-187-E; Order No. 2015-712, Docket No. 2015-160-E; Order No. 2016-758, Docket No. 2016-224-E.

these facts to conclude that the courts would apply a negative ruling on the constitutionality of the BLRA retroactively.

B. Even if the BLRA Were No Longer Applicable, That Would Not Establish That ORS's Proposed Rates Are Fair and Reasonable.

If the BLRA were constitutionally flawed (which it is not), that would not establish that the rates requested by ORS are fair and reasonable. Rates must be justified as fair and reasonable based on their own merits, and at the time and in the context that they are set. The fact that one set of rates is based on an arguably defective statute does not make an earlier or different set of rates fair and reasonable. The Request attacks the constitutionality of the BLRA but provides not basis for concluding that the rates ORS request are fair and reasonable today.

The earlier electric rates that go back into force if the Suspension request were to be granted were established in Order No. 2012-951, and based on a test year ending December 31, 2011. As Mr. Hinson's affidavit indicates, SCE&G's expenses, revenues and investments have changed in important ways since then. (Hinson Aff., ¶ 8.) The earlier rates were set on data that is now approximately five years out of date and would not be fair and reasonable given the intervening changes.

Furthermore, even if the BLRA were invalid (which it is not), that does not mean that SCE&G's investment in the new nuclear project would be disallowed for ratemaking purposes. Indeed, part of that investment – the approximately \$310 million that represents transmission projects – will be put in service shortly.

Furthermore, the BLRA is only one statute among many statutes and ratemaking principles that govern the recovery of investment in utility projects. The BLRA gave statutory standing to existing ratemaking principles that do not depend on the BLRA to have force going forward.

Pre-BLRA rules allowed utilities to include Construction Work in Progress in rates through general electric rates proceedings conducted during construction, as SCE&G did when building the Cope Generating Station and the Jasper Generating Station. (See Order No. 1993-465; Order No. 1996-15; Order No. 203-38.) Furthermore, there is no general prohibition against including the investment of abandoned plants in rates which would automatically apply in the absence of the BLRA:

Approximately 100 state regulatory agencies in some 33 jurisdictions have faced the question of how to allocate the burden of costs associated with abandonment of power plant projects. As the Supreme Judicial Court of Massachusetts summarized in *Attorney Gen. v. Department of Pub. Util.*, 390 Mass. 208, 455 N.E.2d 414, 422 (1983):

A substantial majority of the public utility regulatory agencies that have considered the question have permitted a utility to recover all or some portion of the prudently incurred costs of a nuclear power plant reasonably abandoned before completion.

People's Org. for Wash. Energy Res. v. Wash. Util. & Transp. Comm'n, 104 Wash. 2d 798, 819, 711 P.2d 319, 331 (1985) ; accord, *State ex rel. Util. Comm'n v. Thornburg*, 325 N.C. 463, 476, 385 S.E.2d 451, 458 (1989). Pre-BLRA rate making principals do not mandate disallowance of SCE&G's new nuclear investment, as ORS suggests.

III. THE BASE LOAD REVIEW ACT IS CONSTITUTIONAL.

In this proceeding, ORS raises what is, for all intents and purposes, a facial challenge to the BLRA that this Commission cannot adjudicate. However, even if the Commission could rule on the constitutionality of the BLRA, there would be no basis for the Commission to rule it to be unconstitutional.

The purported unconstitutionality of the BLRA rests on three conclusions contained in the Attorney General's Opinion:

- The BLRA does not "strike the constitutionally required balance between investors and ratepayers;"

- The BLRA “denies ratepayers procedural due process;” and
- The BLRA, by allowing a public utility to recover its investment in an abandoned nuclear plant, “transfers private property (ratepayers’ money) to another private entity (the utility) for a private use (payment to utility’s investors).”

(Request, ¶ 14 (quoting Att’y Gen. Advisory Op. Re BLRA).) Each is without merit.

A. The Constitutional Constraints on Ratemaking Apply to Limit Confiscatory Takings of Utility Property.

In reliance on the Attorney General’s Opinion, ORS asserts that the BLRA fails to “strike the constitutionally required balance between investors and ratepayers.” (Request, ¶ 14 (quoting Att’y Gen. Advisory Op. Re BLRA).) This argument mistakenly assumes that the constitutional analysis of ratemaking involves the balancing of competing constitutional interests of utilities and customers. But that is not the case. The rights of customers – important as they are – are statutory and not constitutional in nature. The determinative constitutional issues relate to confiscation of utility property. The statutory and policy interests of consumers only come into play once the constitutional takings requirements are satisfied. Accordingly, there is only one set of constitutional interests involved here, and no balancing of constitutional interests is necessary.

There is good reason that this is the case. The Taking Clause of the Constitution applies to property taken by the government for public use. In public utility ratemaking, a utility which is owned by private investors is subject to a statutory duty to provide service to the public on demand. *See, e.g., Duquesne*, 488 U.S. at 307; *De Pass v. Broad River Power Co.*, 173 S.C. 387, 176 S.E. 325, 333 (1934). Moreover, the utility must offer its service at rates set by the government. *See, e.g., Verizon Commc’ns Inc.*, 535 U.S. at 477. Because the utility is compelled to use its property for the public good, without any control over the price it charges,

the government cannot set a rate that is so low as to be confiscatory. *See, e.g., Duquesne*, 488 U.S. at 307; *In re Railroad Commission Cases*, 116 U.S. 307, 331 (1886).

In contrast, courts have consistently held that, while utility customers can and do have statutorily protected rights in the ratemaking processes, they do not have constitutionally protected property interests in rates or ratemaking. There is copious authority for this proposition, including a leading case that originated in South Carolina, *Holt v. Yonce*, 370 F. Supp. 374 (D.S.C. 1973) (three-judge court) (per curiam), *aff'd* 415 U.S. 969 (1974).⁹

“[R]atfixing power operates exclusively within a range of reasonableness, bounded on the one hand by the utility’s *constitutional* right to a fair and reasonable return, and on the other hand by its customers’ *statutory* right to rates that are not unreasonable or exorbitant.” *Gulf States Util. Co. v. Pub. Util. Comm’n*, 784 S.W.2d 519, 520 n.2 (Tex. App. 1990), *aff’d*, 809 S.W.2d 201 (Tex. 1991) (emphasis added). Accordingly, in *Mims v. Edgefield Cty. Water & Sewer Auth.*, the South Carolina Supreme Court held that the constitutionality of rates should be

⁹ *See, e.g., Wright v. Cent. Ky. Natural Gas Co.*, 297 U.S. 537, 542 (1936) (per curiam) (holding that ratepayers had no vested property right in impounded funds they had paid to the utility); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933) (“No one has a legal right to the maintenance of an existing rate or duty.”); *In re Office of Consumer Advocate*, 803 A.2d 1054, 1059 (N.H. 2002) (“[U]tility customers do not have a vested property interest in the setting of utility rates sufficient to invoke [due-process] protections”); *Ky. Indus. Util. Customers, Inc. v. Ky. Util. Co.*, 983 S.W.2d 493, 497 (Ky. 1998) (“Utility ratepayers have no vested property interest in the rates they must pay for a utility service despite the fact that it is provided by a regulated monopoly.”); *Ala. Metallurgical Corp. v. Ala. Pub. Serv. Comm’n*, 441 So. 2d 565, 570 (Ala. 1983) (“[A] consumer has no property right in a given level of utility rates.”); *Ga. Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 561, 212 S.E.2d 628, 631 (Ga. 1975) (“But an attack on rates solely because they are alleged to be too high is grounded in substantive due process. It is a claim that the consumer has been deprived of his ‘property’ without due process of law. And such a claim must fall for the simple reason that the consumer has no ‘property’ right in the rate he pays for utilities.”); *Rivera v. Chapel*, 493 F.2d 1302, 1304 (1st Cir. 1974) (“The consumers have established no property interest which can be protected by the Takings Clause of the Constitution. All price regulation which results in upward adjustments may be seen as reducing the potential purchasing power of the consumer. Potential purchasing power is not the kind of ‘property’ which has been traditionally protected by this kind of procedural safeguard.”); *Ga. Power Project v. Ga. Power Co.*, 409 F. Supp. 332, 340–41 (N.D. Ga. 1975) (“[T]he fact that plaintiffs have an interest in lower electric rates . . . does not mean that they have a sufficient ‘property’ interest in lower rates to invoke constitutional due process protection.”); *Hartford Consumer Activists Ass’n v. Hausman*, 381 F. Supp. 1275, 1281 (D. Conn. 1974) (“Courts have yet to hold that a state agency’s approval of a utility rate increase involves a deprivation of a customer’s property interest, which is actionable under the Fourteenth Amendment.”); *Sellers v. Iowa Power & Light Co.*, 372 F. Supp. 1169, 1172 (S.D. Iowa 1974) (three-judge court) (“[U]tility customers have no vested rights in any fixed utility rates.”), *quoted with approval in State ex rel. Jackson County v. Pub. Serv. Comm’n*, 532 S.W.2d 20, 31–32 (Mo. 1975).

assessed based on their financial impact on the utility; burdensomeness to customers is considered only to the extent that rates exceed the constitutional requirement of just compensation:

[T]he reasonableness of rates should be determined by an evaluation of the utility's holdings and obligations and the return which the utility realizes from the rates. The focus is upon the financial condition of the utility, particularly whether the return realized from the rates is so low as to be confiscatory to the utility or so high as to be unduly burdensome to the utility's customers.

278 S.C. 554, 555-56, 299 S.E.2d 484, 485-86 (1983).

Because customers do not have constitutionally protected property interests in rates and ratemaking, they cannot challenge ratemaking statutes on constitutional grounds related to confiscation or unconstitutional taking of property. Indeed, in almost every case the Attorney General cites in its opinion, it was the utility – not the ratepayers – that attacked a rate as unconstitutional.¹⁰

Because customers lack a cognizable interest under the Takings Clause, the Attorney General's Opinion seeks to create a new constitutional requirement.¹¹ It argues that all rate

¹⁰ See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942); *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938); *Columbus Gas & Fuel Co. v. Pub. Util. Comm'n*, 292 U.S. 398 (1934); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923); *Smyth v. Ames*, 169 U.S. 466 (1898); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987) (en banc); *S. Bell Tel. & Tel. Co. v. PSC*, 244 S.E.2d 278 (S.C. 1978); *State ex rel. PSC v. Atl. Coast Line R. Co.*, 72 S.E.2d 438 (S.C. 1952); *Kan. Gas & Elec. Co. v. State Corp. Comm'n*, 720 P.2d 1063 (Kan. 1986); *Penn. Elec. Co. v. Pub. Util. Comm'n*, 502 A.2d 130 (Pa. 1985); *Dayton Power & Light Co. v. Pub. Util. Comm'n*, 447 N.E.2d 733 (Ohio 1983).

¹¹ In making its argument, the Attorney General's Opinion relies extensively on Judge Starr's concurring opinion in *Jersey Power and Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987), which it characterizes as "eloquently elaborat[ing]" upon the United States Supreme Court's pronouncement in *Hope* regarding what constitutes a taking in the context of utility rates." (See Att'y Gen. Advisory Op. at 29-30.) In the passage that the Attorney General favorably quotes, Judge Starr states that:

"[A] taking occurs not when an investment is made (even one under legal obligation), but when the balance between investor and ratepayer interests—the very function of utility regulation—is struck unjustly."

(*Id.* at 30 (quoting *Jersey Power and Light Co.*, 810 F.2d at 1191 (Starr, J., concurring) (emphasis added by the Attorney General).) Judge Starr's concurred in a case heard *en banc* by ten judges of the D.C. Circuit. Judge Starr joined in the majority decision but apparently could not convince the majority to include his reasoning in their

statutes must balance utility and customer interests not only to the satisfaction of the General Assembly but also to the satisfaction of the Attorney General and the courts. The Opinion seeks to create this new constitutional requirement based on S.C. Const. art. IX, § 1 which states, “The General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest.”

Article IX, § 1 of the South Carolina Constitution, however, is an assignment of ratemaking authority to the General Assembly and nothing more. *See S.C. Pub. Serv. Auth. v. Citizens & S. Nat’l Bank*, 300 S.C. 142, 160, 386 S.E.2d 775, 785 n.7 (1989) (per curiam) (“Article IX, Section 1 gives the General Assembly power to provide for the regulation, inter alia, of publicly owned utilities.”); *Duke Power Co. v. S.C. Pub. Serv. Comm’n*, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985) (“[T]he legislature has power to regulate utility rates. Art. IX, § 1, S.C. Constitution.”). The mere mention of “the public interest” hardly limits the legislative power, as what constitutes the public interest supremely is a matter for the General Assembly to decide. *See, e.g., Wolper v. City Council*, 287 S.C. 209, 216, 336 S.E.2d 871, 875 (1985) (“A determination of public purpose is primarily a question for the legislature. This Court will not interfere with that finding unless it is clearly wrong.”); *Elliott v. McNair*, 250 S.C. 75, 88, 156 S.E.2d 421, 428 (1967) (stating the same); *Park v. Greenwood Cty.*, 174 S.C. 35, 176 S.E. 870, 872 (1934) (stating the same).

opinion. No one else joined Judge Starr in that concurring opinion. Among the judges who formed the majority in the case, but declined to join in with Judge Starr’s concurrence, were Ruth Bader Ginsburg, Antonin Scalia, and Robert Bork. The logic of the concurrence has not been followed in later cases nor has it been well received by commentators: “Judge Starr was clearly wrong when . . . he refer[red] to the possibility of ‘a taking of the property of ratepayers through unjustifiably exorbitant rates.’” Walter Pond, *The Law Governing the Fixing of Public Utility Rates*, 41 ADMIN. L. REV. 1, 18 n.87 (1989) (quoting *Jersey*, 810 F.2d at 1191 (Starr, J., concurring)); *see also id.* at 17–19 (discussing *Holt* and related cases).

In any event, there is more to “the public interest” than just low rates. As one commentator has explained, “[t]he public interest demands, to an equal if not greater degree, financially viable utility companies which can provide adequate service to present and future consumers.” Walter Pond, *The Law Governing the Fixing of Public Utility Rates*, 41 ADMIN. L. REV. 1, 19 (1989) (citing *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958)). Indeed, under the Supremacy Clause, no provision of the South Carolina Constitution can serve as a limitation on a utility’s rights under the Takings Clause of the United States Constitution to just compensation. U.S. Const. art. VI, § 2.

In this case, there would be nothing constitutionally defective about the balance the General Assembly struck in adopting the BLRA, even if a specific justification satisfactory to the court or the Attorney General was constitutionally required. As the Attorney General acknowledges, the BLRA “was part of a much larger effort throughout the nation to incentivize construction of new nuclear power plants by utilities as a means of establishing energy independence.” (Att’y Gen. Advisory Op. at 2.) It was passed ““to mitigate the risks utilities assume for [nuclear] projects”” and to encourage the construction of additional nuclear power plants and units. (*Id.* (quoting Galloway & Cousineau, *Cost Recovery for Pre-Approved Projects*, *Fortnightly*, 151 NO. 6 PUB. UTIL. FORT. 54, 55 (June 1, 2013).) The BLRA “came about as a result of the need in this State to develop usable sources of clean energy and to lessen reliance upon fossil fuels.” (*Id.* at 3.)

The BLRA, therefore, represents a legislatively crafted bargain between investors and the State of South Carolina. The object was to make it possible for investors to underwrite costly investments in nuclear power, which were seen at the time as providing important benefits for South Carolina and its citizens. At that time, coal plants were being closed for environmental

reasons, natural gas supplies were dwindling and increasingly hard to replace, fossil fuel prices were exceptionally volatile, and CO₂ regulations appeared imminent. As the Commission previously found:

[T]he principal benefit of nuclear construction, in addition to lower forecasted costs, is the fact that it helps insulate customers from the price volatility and supply risk that are increasingly associated with fossil fuel fired generation. Nuclear generation also insulates customers from future CO₂ and other environmental compliance costs associated with fossil fuels, which are likely to be significant.

(Order No. 2009-104(A) at 56.)

Moreover, as SCE&G witnesses have testified in past Commission proceedings: “The BLRA was adopted to make it possible for electric utilities like SCE&G to consider building new nuclear units. Before the BLRA was adopted, building a new nuclear plant was not a viable option for SCE&G. For SCE&G to seriously consider adding new nuclear capacity, legislative action was needed” (Docket No. 2016-223-E, Transcript of Hearing at 476.)

The BLRA was based on an implicit bargain that, if investors would provide the billions of dollars needed to finance these plants for the benefit of South Carolina and its people, the General Assembly, through the BLRA, would ensure that those investors were repaid. As current facts show, one of the risks that the BLRA sought to address was the potential for construction to be abandoned after the project was undertaken for reasons that were not envisioned at the time. In recognition of that risk, the BLRA includes § 58-27-280(K), which specifically protects investors in case of such an abandonment. Protection in case of abandonment was an express component of the bargain that the State of South Carolina offered investors in BLRA approved nuclear construction projects.

Current circumstances show that the magnitude of the losses that investors might realize – and are now realizing – in abandonment, and why statutory protection against prudence

determinations reviewed in hindsight would have been important to investors. Mr. Addison's affidavit shows that equity investors have already experienced the loss of \$2.6 billion in value. (Addison Aff., ¶ 19.) A write down of \$3 billion is threatened. (*Id.*, ¶ 29.) More dire losses could result if write-downs, covenant defaults, and credit rating down-grades were to make the finances of the Company unsustainable.

The investors' need for BLRA protections in case of abandonment can hardly be doubted in the light of current circumstances. Investors have made \$4.9 billion available to a project that the General Assembly and others clearly expected to provide great benefits to the people of South Carolina. Those expectations have been destroyed by unforeseen circumstance, but these losses show why the BLRA struck the bargain that it did.

B. The “Used and Useful” Principle Is Not Constitutionally Mandated.

In relying on the Attorney General's Opinion as the basis for requesting the Suspension, ORS also erroneously suggests that South Carolina law establishes that an “unfinished, or canceled nuclear power plant is not ‘used or useful’ property and thus cannot be included in the rate base.” (*See* Att’y Gen. Advisory Op. Re BLRA at 20.) This is not the case.

A century ago, under *Smyth v. Ames*, 169 U.S. 466 (1898), “it was thought that the Constitution required rates to be set according to the actual present value of the assets employed in the public service.” *Duquesne Light Co.*, 488 U.S. at 308. “The [*Smyth*] theory required that consumers pay the market value of the property they were using because the property was regarded as having been taken. Recovery was therefore required only on property ‘used and useful’ to the public, for property that was not being used could not be considered to have been taken.” *Jersey Cent. Power & Light Co.*, 810 F.2d at 1175. “But *Smyth* proved to be a troublesome mandate, as Justice Brandeis, joined by Justice Holmes, famously observed . . .” *Verizon Commc’ns Inc.*, 535 U.S. at 481–82. Finally, in 1944, *Smyth*’s “practical difficulties . . .

led to its abandonment as a constitutional requirement.” *Duquesne*, 488 U.S. at 309–10. In its place stands the “end result” test adopted in *Hope*. See *Hope Natural Gas Co.*, 320 U.S. at 602–03.

As one court has noted, with the doctrinal shift from *Smyth* to *Hope*, “the constitutional basis for ‘used and useful’ was swept away.” *Wash. Gas Light Co. v. Baker*, 188 F.2d 11, 19 (D.C. Cir. 1950). Or, as another court noted, after *Hope*, “‘used and useful’ ceased to have any constitutional significance.” *Jersey Cent. Power & Light Co.*, 810 F.2d at 1175. Though South Carolina authorities have referenced the “used and useful” principle in quoting general ratemaking principles from older cases, there is no constitutional mandate that such a principle be applied in all cases and the holdings in the cases that quote this language so demonstrate. See *Hamm v. Pub. Serv. Comm’n*, 309 S.C. 282, 285 n.1, 291, 422 S.E.2d 110, 112 n.1, 115 (1992).

Moreover, this Commission has consistently allowed utilities to include construction costs in their base rates since at least 1974, a clear departure from “used and useful” as a constitutional mandate.¹² (See Comm’n Directive (Nov. 13, 1974).) The South Carolina Supreme Court has also approved this practice of including construction work in progress costs in the base rates for utilities. *Hamm*, 309 S.C. at 291, 422 S.E.2d at 115. In fact, the Supreme Court expressly approved of base rates that included base property not being used to provide electricity to customers in *Southern Bell*, when it held that the Commission should have made a factual determination regarding the exclusion from rate base of property held for future use instead of “arbitrarily excluding all such property from the rate base.” *Southern Bell*, 270 S.C. at 600-01, 244 S.E.2d at 283-84. “[R]ate base should reflect the actual investment by investors in the Company’s property and value upon which stockholders will receive a return on their

¹² This longstanding practice is entitled to deference. See *Media Gen. Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 388 S.C. 138, 149, 694 S.E.2d 525, 530–31 (2010).

investment.” *Parker*, 280 S.C. at 313, 313 S.E.2d at 292 (internal quotation marks, citation, and emphasis omitted).

The General Assembly was operating well-within its constitutional parameters when it adopted the BLRA, and it expressly chose not to make the used and useful test operative for revised rates orders. *See* S.C. Code Ann. § 58-33-275(A).

C. The BLRA Does Not Deprive Ratepayers of Any Procedural Due Process Rights.

Procedurally, “due process requires notice, a meaningful opportunity to be heard, and judicial review.”¹³ *Thompson v. State*, 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016). The BLRA satisfies all of these requirements. As a general matter, the BLRA provides the public with notice and an opportunity to be heard whenever a decision is to be made under its provisions. *See* S.C. Code Ann. §§ 58-33-240, 58-33-260, 58-33-270, 58-33-280, 58-33-285, 58-33-270, 58-33-275(E). In fact, the same procedural protections that apply to general electric rate proceedings apply to all contested case decisions under the BLRA. *See* S.C. Code Ann. § 58-33-240. There is no suggestion here that these procedural safeguards have been violated in any of the proceedings involving this project.

Nevertheless, ORS – through the Attorney General’s Opinion – contends that the BLRA denies procedural due process to ratepayers because the BLRA states that: (a) “[a] base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses are properly included in rates so long as the plant is constructed or being constructed within [certain

¹³ The due process protections afforded by the South Carolina Constitution are identical to those provided by the United States Constitution. *See S.C. Ambulatory Surgery Ctr. Ass’n v. S.C. Workers’ Comp. Comm’n*, 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010).

parameters];” and (b) such determinations “may not be challenged or reopened in any subsequent proceeding.” S.C. Code Ann. § 58-33-275(A), (B).

In short, the Attorney General’s Opinion suggests that the BLRA is unconstitutional because it does not provide the opportunity for individual ratepayers to relitigate – without apparently limitation, and with the benefit of hindsight – decisions concerning prudence made in prior contested case dockets. If this constitutes a due process violation, then it is hard to see how the judgement of any court, administrative or judicial, can have finality. Furthermore, it is not clear how such a claim can be brought by ORS, which participated in, and in most cases affirmatively endorsed, the orders it now challenges.

In any event, the South Carolina Supreme Court expressly addressed and approved the provisions of the BLRA that ORS now claims do not provide adequate due process to ratepayers. In *S.C. Energy Users Comm. v. S.C. Elec. & Gas*, the Supreme Court noted that these provisions were necessary to prevent constant relitigation of the prudence of SCE&G’s construction project:

Update proceedings are likely to be a routine part of administering BLRA projects going forward (including future projects proposed by other electric utilities), such that under the Sierra Club’s argument, the prudence of the decision to build the plant will be open to repeated relitigation during the construction period if a utility seeks to preserve the benefits of the BLRA for its project. Reopening the initial prudence determinations each time a utility is required to make an update filing would create an outcome that the BLRA was intended to prevent and would defeat the principal legislative purpose in adopting the statute.

410 S.C. 348, 360, 764 S.E.2d 913, 919 (2014) (quoting Order No. 2012-884 at 17-18).

The BLRA’s finality provisions require that prudence decisions be raised and litigated only once. “Due process does not guarantee multiple bites of the same apple.” *In re Jordana*, 232 B.R. 469, 480 (B.A.P. 10th Cir. 1999), *aff’d*, 216 F.3d 1087 (10th Cir. 2000). Due process only requires notice and an opportunity to be heard tailored to the circumstances presented. *Kurschner v. City of Camden Planning Comm’n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008);

see also Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”). That is precisely what the BLRA provides.

Moreover, because ORS has been a party to every proceeding under the BLRA, the public’s interest has always been represented in BLRA proceedings. *See* S.C. Code Ann. § 58-4-10(B) (recognizing that ORS “represent[s] the public interest of South Carolina before the commission”). The assertion that the BLRA denies ratepayers due process rights is baseless and should be dismissed, with prejudice.

IV. ORS CANNOT SHOW THAT SCE&G WITHHELD MATERIAL FACTUAL INFORMATION OR OTHERWISE ACTED IN A WAY THAT WOULD INVALIDATE PRIOR REVISED RATES ORDERS.

In its Request, ORS states: “In addition, it is being alleged SCE&G failed to disclose information that should have been disclosed and that would have appeared to provide a basis for challenging prior request.” (Request, ¶ 17.)

The pleading rules require allegations of fraud or mistake to be pled with specificity. *See* S.C.R. Civ. P. 9(b); *see also Chewning v. Ford Motor Co.*, 354 S.C. 72, 86, 579 S.E.2d 605, 613 (2003) (“Again, any claim of fraud upon the court must be accompanied by particularized allegations.”). ORS has failed to plead any particularized allegations, such as what information should have been disclosed, when it should have been disclosed, or what effect this information would have had.

“Fraud upon the court is a ‘serious allegation . . . involving ‘corruption of the judicial process itself.’” *Chewning*, 354 S.C. at 78, 579 S.E.2d at 608 (quoting *Cleveland Demolition Co., Inc. v. Azcon Scrap Corp*, 827 F.2d 984, 986 (4th Cir. 1987)). Fraud upon the court requires a showing of “intent to deceive” and “conscious wrongdoing” typically by an attorney as officer of the court. *Chewning*, 354 S.C. at 78, 579 S.E.2d at 608.

Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court.

Id. at 78, 579 S.E.2d at 608 (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir.1978)); *accord Ray v. Ray*, 374 S.C. 79, 83, 647 S.E.2d 237, 239 (2007).

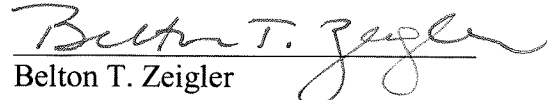
ORS cannot allege these allegations with particularity because SCE&G has not withheld from the Commission or ORS material factual information related to the project or done anything to justify invalidating the prior revised rates orders. Appendix C to this motion provides a selection of the information publically disclosed by SCE&G or documented as being known by ORS concerning the issues where “it is being alleged” (as SCE&G understands it) that SCE&G withheld information from disclosure. This compilation shows that there is no substance to these allegations.

CONCLUSION

As discussed above, ORS has failed to conduct a preliminary investigation prior to filing its Request, as required by § 58-27-920, or to provide *any* factual basis for its Request. Because of this failure, it is impossible for the Commission to find that ORS’s requested rate changes satisfy the “fair and reasonable” standard and do not violate the takings clauses of the United States and South Carolina Constitutions. In fact, the filings currently before the Commission show that ORS’s requested rate changes would be neither fair nor reasonable because they would jeopardize SCE&G’s financial health and long-term viability. Moreover, the BLRA remains the binding law in this State unless and until it is found to be unconstitutional by a court of law, or revoked by the General Assembly. Thus, the BLRA is binding on this Commission, and ORS has not set forth any cognizable basis for the relief it now seeks or any sustainable argument that the BLRA is unconstitutional. For these reasons, the Commission should deny ORS’s Request, with prejudice, and find that its Request is illegal, unconstitutional, and beyond the statutory

powers bestowed on the Commission. It should also dismiss ORS's request to amend the hypothetical order it seeks because it is not currently ripe for adjudication.

Respectfully submitted,



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Cayce, South Carolina
October 31, 2017

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2017-305-E

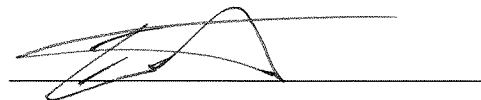
IN RE:

Request of South Carolina Office of)	CERTIFICATE OF SERVICE
Regulatory Staff for Rate Relief to)	
SCE&G Rates Pursuant to)	
S.C. Code Ann. § 58-27-920)	
_____)	

This is to certify that I have caused to be served this day one copy of the **SCE&G'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS** to the persons named below at the addresses set forth via U.S. First Class Mail and electronic mail:

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